## APPENDIX A – ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 6, 2009

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-05-CA-11-H

LONE STAR BAKERY, INC.,

Plaintiff,

v.

UNITED STATE OF AMERICA,

Defendant.

## ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a hard case, but not a difficult one. Plaintiff Lone Star Bakery, Inc. operates a commercial bakery in China Grove, Texas. It brings this civil action for damages against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1346 (b). In its amended complaint, the Plaintiff alleges that it suffered injury as a proximate result of the negligence of the Food and Drug Administration in

connection with the recall of one of its products in 2002. On November 7, 2008, the Defendant filed a motion to dismiss. Since the Defendant's motion relies in part on matters outside the pleadings, it must be treated as a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

The following facts are established by the summary judgment evidence: on or about March 1, 2002, a customer of the Save-A-Lot store in Daytona Beach, Florida purchased an egg and sausage sandwich on a cheese biscuit. After eating the sandwich, the customer had a stomach ache. The matter was reported to the Florida Department of Agriculture and Consumer Services, which dispatched an inspector to the Save-A-Lot store. The state inspector collected five of the egg, sausage, and cheese biscuit sandwiches and took them to the State's laboratory for testing. Two of those sandwiches tested positive for a bacterium called *Listeria monocytogenes*. The distributor of the sandwiches, MarketFare of Phoenix, Arizona, was notified of these findings. On March 22, 2002, MarketFare issued a voluntary recall of the product.

On or about March 20, 2002, the Florida agency also passed on its findings to the Orlando office of the Food and Drug Administration. On March 21, 2002, the FDA sent inspectors to the MarketFare plant in Phoenix to collect additional samples for laboratory testing. This time, the FDA inspectors collected samples of the component parts as well as samples of the finished product. The samples thus collected were sent to the FDA's

regional laboratory in Los Angeles, California for further testing. A few days later the FDA notified MarketFare that both the finished sandwich and the biscuit component had tested "presumptive positive" for *Listeria monocytogenes*. In April 2002, MarketFare issued another voluntary recall of this product. MarketFare also informed Southland Corporation (7-Eleven Stores) of the positive test results. According to the Plaintiff, Southland decided to discontinue use of all biscuits from Plaintiff's bakery, and terminated a long-standing business relationship with the Plaintiff. The Plaintiff contends that these events proximately caused irreparable harm to its business, resulting in losses of more than two million dollars.

In April 2002, FDA inspectors arrived at the Plaintiff's China Grove bakery to conduct an inspection. In the course of that inspection, FDA personnel observed perforations in the "shrink wrap" used by the Plaintiff to seal the biscuits before they were shipped to MarketFare in Phoenix. It is the Plaintiff's contention that the FDA inspectors' lack of awareness of the perforations in the shrink wrap when the products were tested in March 2002 compromised the test results, and could have caused an innocent bakery (Lone Star) to be blamed for the presence of *Listeria* in the sandwiches. The Plaintiff asserts that the FDA was negligent in failing to follow its own regulations and procedures in collecting and testing samples, and that such negligence was the proximate cause of severe financial harm to the Plaintiff.

The Government is liable to a claimant under the Federal Tort Claims Act only if a private party under the same or similar circumstances would be liable under the law of the place where the tortious act or omission occurred. 28 U.S.C. §§ 1346 (b); 2674. In the instant case, the Plaintiff has the burden of proving that a private testing laboratory would be held liable for negligence under Texas law on the basis of the facts presented in this case. In this connection, the Plaintiff must do more than show that the federal agency did not follow its own regulations and procedures. *Quijano v. United States*, 325 F.3d 564, 568 (5th Cir. 2003); *Johnson v. Sawyer*, 47 F.3d 716, 727-28 (5th Cir. 1995) (en banc); *Tindall v. United States*, 901 F.2d 53, 56 n. 8 (5th Cir. 1990); *United States v. Smith*, 324 F.2d 622, 624-25 (5th Cir. 1963). The standard of care applicable to a private entity under state law is not determined by the regulations of a federal agency, which may be more strict than state law requires. *Quijano*, 325 F.3d at 568. The Plaintiff's evidence fails to establish a standard of care applicable to a private testing laboratory in Texas. Instead, its evidence, including expert opinion evidence, focuses almost exclusively on the alleged failure of the Food and Drug Administration to follow its own regulations, procedures, and protocols to the letter. This is insufficient to raise a genuine fact issue which would preclude summary judgment.

The Plaintiff also has the burden of proving that the alleged negligence of the Food and Drug Administration was a proximate cause of its

loss. The summary judgment proof indicates that *Listeria* was present in at least some of the cheese biscuit sandwich samples tested in both state and federal laboratories in March 2002. Although seven years have gone by since those events occurred, and more than four years since the Plaintiff's complaint was filed in January 2005, the Plaintiff has come forward with no evidence that employees of the Food and Drug Administration somehow contaminated the cheese biscuit sandwiches with *Listeria.* The scenario was that state and federal laboratories detected the presence of *Listeria* in the product; MarketFare was notified; MarketFare issued a recall for the product; MarketFare notified Southland Corporation; and Southland chose to cancel orders for bakery products manufactured by Lone Star, resulting in injury to the Plaintiff. However, in spite of the passage of years, the Plaintiff has been unable to develop evidence which would raise a genuine fact issue as to whether any act or omission on the part of the Food and Drug Administration was a proximate cause of its injury.

In summary, there is no genuine issue of material fact, and the Defendant is entitled to judgment in its favor as a matter of law.

IT IS THEREFORE ORDERED that the Defendant's motion, treated as a motion for summary judgment under Rule 56, be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that judgment be, and it is hereby, entered in favor of the

Defendant, and that the Plaintiff take nothing by its suit.

IT IS FURTHER ORDERED that the Plaintiff pay the costs of suit herein incurred, for which let execution issue.

SIGNED AND ENTERED this 5th day of March, 2009.

/s/
HARRY LEE HUDSPETH
Sen. United States District Judge